

1 KEKER & VAN NEST LLP
2 ROBERT A. VAN NEST - # 84065
3 rvannest@kvn.com
4 CHRISTA M. ANDERSON - # 184325
5 canderson@kvn.com
6 DANIEL PURCELL - # 191424
7 dpurcell@kvn.com
8 633 Battery Street
9 San Francisco, CA 94111-1809
10 Telephone: (415) 391-5400
Facsimile: (415) 397-7188

7 KING & SPALDING LLP
8 BRUCE W. BABER (pro hac vice)
9 bbaber@kslaw.com
10 1180 Peachtree Street, N.E.
Atlanta, Georgia 30309
Telephone: (404) 572-4600
Facsimile: (404) 572-5100

11 Attorneys for Defendant
12 GOOGLE INC.

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 ORACLE AMERICA, INC.,

17 Plaintiffs,

18 v.
19 GOOGLE INC.,
20 Defendant.

Case No. 3:10-cv-03561 WHA
GOOGLE INC.'S OBJECTION TO
ORACLE'S PROFFER REGARDING DR.
MARK REINHOLD'S PHASE II
TESTIMONY

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Dept. Courtroom 8, 19th Fl.
Judge: Hon. William Alsup

1 Google objects to Oracle seeking to elicit testimony from Dr. Mark Reinhold during Phase
 2 II on several topics listed in its proffer. Because Oracle's recent proffer, ECF 1952, and even
 3 more recent disclosures of documents never produced in discovery demonstrate that Oracle has
 4 failed to comply with Rule 26, Google objects to the proffered testimony under Rule 37.

5 **A. Legal Standard**

6 Rule 37(c) applies when a party fails to disclose required information or supplement its
 7 disclosures in a timely fashion. It provides that, “[i]f a party fails to provide information or
 8 identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information
 9 or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was
 10 substantially justified or is harmless.” In terms of appropriate sanctions, Rule 37(c)(1)(C) allows
 11 the Court, *inter alia*, to “prohibit[] the disobedient party from supporting or opposing designated
 12 claims or defenses, or from introducing designated matters in evidence.” Rule 37(b)(2)(A)(ii).

13 **B. Objection to Dr. Reinhold Attempting to Quantify the Overlap Between Java
 14 SE and Java ME.**

15 Oracle has said that it “expects that Dr. Reinhold will explain the relationship between
 16 Java SE and Java ME. In particular, he will quantify the degree of overlap between Java ME and
 17 Java SE, and testify as to material added to ME from SE, including Java SE versions 1.4 and 5.0,
 18 and later versions of Java ME.” ECF 1952 at 1. But just two months ago, at his employee-expert
 19 deposition, Dr. Reinhold was not willing or able to offer any such information. The testimony
 20 speaks for itself:

21 Q. What, if any, opinions do you have regarding the relationship between Java
 22 SE and Java ME?

23 A. At a high level, one could say that Java ME is Java SE's little brother.

24 Q. Does -- how many API packages does Java SE have? Let me ask specifically
 25 about Java SE 5, if you remember, how many API packages Java SE 5 has.

26 A. I believe it was 166 or thereabouts.

27 Q. Approximately how many API packages did the contemporary version of
 28 Java ME have?

 A. I do not know, but it was less.

1 Q. Order of magnitude different?

2 A. I do not know offhand.

3 Q. How familiar are you with the Java ME platform?

4 A. I have never worked on it directly myself.

5 Q. So not all that familiar?

6 A. Correct.

7 Q. Do you know the extent of the overlap between the packages and classes and
8 methods between Java SE and Java ME?

9 A. Not in detail.

10 Q. At what level of understanding do you have regarding the degree of overlap?

11 A. There are -- of the packages you find in Java SE, many of them are not in
12 Java ME. There are some packages in Java ME that are not in Java SE.

13 Q. Do you have any sense of the relative quantity of SE packages that are not in
14 Java ME?

15 A. No.

16 Q. Do you have any sense of the amount of packages in ME that are not in SE?

17 A. I couldn't give you a number.

18 March 15, 2016 Depo. Tr. at 63:15-64:23. How Oracle can purport to offer Dr. Reinhold to
19 "quantify the degree of overlap between Java ME and Java SE" in light of this testimony is
20 inexplicable. Google objects to any such attempt by Oracle to offer such testimony after skirting
its Rule 26 obligations. The proffered testimony should be excluded pursuant to Rule 37.

21 **C. Objection to Dr. Reinhold Testifying Regarding Belatedly Disclosed
22 Copyright Registrations.**

23 Along similar lines, Oracle suggests that Dr. Reinhold "will also testify regarding the
24 copyright registration of those works [Java SE and Java ME]." ECF 1952 at 1. This raises two
25 issues. First, by way of its witness and exhibit disclosures, Oracle has indicated that it intends to
26 have Dr. Reinhold testify regarding eight copyright registrations that bear no Bates numbers and
27 were apparently not produced in discovery, but have recently been added to the exhibit list..
28 Specifically, two registrations were identified on May 24th (TX 9229-30), and another six on May

1 25th (TX 9237-42). Google has never had an opportunity to investigate these registrations or
 2 question Dr. Reinhold (or any other Oracle witness) about them. Furthermore, while the first two
 3 relate to the Connected Device Configuration discussed in Phase I, the more recent six relate to
 4 different “profiles” (e.g., “Personal Basis Profile,” “Personal Profile,” and “Foundation Profile”)
 5 that were never mentioned during the fair-use phase.

6 Second, whether and to what extent Dr. Reinhold can lay the foundation for these
 7 registrations is questionable. As he testified above, Dr. Reinhold never worked on Java ME. And
 8 it is doubtful that he would have reason to have seen the copyright registrations Oracle intends for
 9 him to sponsor. Indeed, in the first phase, Dr. Reinhold seemed completely unfamiliar with the
 10 copyright registrations he was shown regarding two Java ME configurations, and did not seem to
 11 have any personal knowledge regarding their release dates. RT 1479:15-1481:20.

12 In sum, because the registrations were not produced during discovery, and Dr. Reinhold
 13 appears to lack the requisite personal knowledge to sponsor them in any event, Google objects to
 14 Oracle attempting to introduce TX 9229-30 and 9237-42 at trial.

15 **D. Objection to Dr. Reinhold Testifying Regarding the Importance of APIs and
 16 Declaring Code to App Programmers.**

17 Oracle has also proffered Dr. Reinhold on “the importance of APIs and declaring code to
 18 app programmers (rather than API re-implementers). In particular, Dr. Reinhold will explain that
 19 the declaring code is necessary for app programmers to access and use the functions provided in
 20 the APIs.” ECF 1952 at 1. Here again, Oracle has a Rule 26 disclosure problem. Specifically,
 21 Oracle has offered Dr. Reinhold as an employee-expert, and provided a related Rule 26(a)(2)(C)
 22 disclosure. (Oracle’s 2/29/2016 Supplemental Rule 26(a)(2)(C) Disclosure). That disclosure,
 23 however, does not include this topic—or even something that would fairly encompass it. For that
 24 reason, Google did not have an opportunity to examine Dr. Reinhold on the issue, and it would be
 25 prejudicial for Oracle to present this testimony now. Accordingly, Google objects to this portion
 26 of Oracle’s proffer regarding Dr. Reinhold.

1 **E. Conclusion**

2 For the foregoing reasons, and pursuant to Rule 37(c)(1), Google objects to the proffered
3 testimony from Dr. Reinhold.

4 Dated: May 25, 2016

KEKER & VAN NEST LLP

6 By: s/ Robert A. Van Nest
7 ROBERT A. VAN NEST
8 CHRISTA M. ANDERSON
9 DANIEL PURCELL

10 Attorneys for Defendant
11 GOOGLE INC.

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